

May 10, 2007

Mr. Jeff Bruette
116 Sleepy Hollow Drive, Suite C
Middletown, DE 19709

Re: **Freedom of Information Act Complaint
Against Town of Middletown**

Dear Mr. Bruette:

On March 22, 2007, our Office received your complaint under the Freedom of Information Act, 29 *Del. C.* Ch.100 ("FOIA"), alleging that the Town of Middletown ("the Town") violated the open meeting requirements of FOIA by not giving the public timely notice that the Town Council would consider an ordinance to enact a new FOIA policy at a meeting on March 12, 2007.

You provided us with the agenda for the Town Council's meeting held on March 12, 2007. The revised agenda (posted on March 9, 2007) listed under Item 12, "Public Hearing – Introduce an Ordinance to enable a new policy for Freedom of Information Act Requests." The agenda noted that "[t]his item was not part of the original agenda which was previously posted on March 20, 2007. This item is being added to the agenda. The delay occurred as a result of receiving the information after the original agenda was posted." ¹

By letter dated March 23, 2007, our Office asked the Town to respond to your complaint by

¹ According to the Town, "the explanation under Item 12 erroneously states that the original agenda was 'previously posted on March 20, 2007' . . . [T]he original agenda was posted on February 21, 2007 and February 28, 2007 (not March 20, 2007)."

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April 2, 2007. Our Office received the Town's initial response on March 29, 2007. By letter dated April 2, 2007, our Office asked the Town for additional information which we received on April 12, 2007.

According to the Town:

The proposed Freedom of Information policy was written by Kristen Krenzer, the Town's Public Relations Officer. Ms. Krenzer had been working on this policy for several weeks. She completed her final draft on March 8, 2007. Once the draft policy was completed, Ms. Krenzer delivered it to the Town Manager, Morris Deputy. In turn, Mr. Deputy immediately amended the agenda to add this item on March 9, 2007.

The Town contends that FOIA authorizes a public body to amend an agenda up to six hours before a meeting so long "the reasons for the delay in posting" are "briefly set forth in the agenda." 29 *Del. C.* §10004(d)(5). According to the Town, "the agenda amendment occurred three calendar days prior to the scheduled meeting (well before the six hour limit). The revised agenda specifically explained that this agenda item was not posted as part of the original agenda because the information (the draft policy) was not received until after the original agenda was posted."

RELEVANT STATUTES

FOIA provides that "[a]ll public bodies shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof."

29 *Del. C.* §10004(e)(2).

FOIA provides that "[w]hen the agenda is not available as of the time of the initial posting of the public notice it shall be added to the notice at least 6 hours in advance of said meeting, and the reasons for the delay in posting shall be briefly set forth in the agenda." *Id.* §10004(e)(5).

LEGAL AUTHORITY

"An agenda serves the important function of notifying the public of the matters which will be discussed and possibly voted on at a meeting, so that members of the public can decide whether to attend the meeting and voice their ideas or concerns.'" *Att'y Gen. Op.* 05-IB11 (Apr. 11, 2005) (quoting *Att'y Gen. Op.* 03-IB22 (Oct. 6, 2003) (quoting *Att'y Gen. Op.* 97-IB20 (Oct. 20, 1997))).

"FOIA allows a public body to amend an agenda when it 'is not available at the time of the initial posting of the public notice' so long as it is added 'to the notice at least 6 hours in advance of said meeting, and the reasons for the delay in posting shall be briefly set forth in the agenda.'" *Att'y Gen. Op.* 05-IB23 (Aug. 15, 2005) (quoting 29 *Del. C.* §10004(e)(5)).

Our Office, however, has "cautioned that this exception does not authorize a public body to amend the agenda prior to a meeting for any reason, but rather applies 'to add items that come up suddenly and cannot be deferred to a later meeting.'" *Att'y Gen. Op.* 05-IB15 (June 20, 2005) (quoting *Att'y Gen. Op.* 05-IB09 (Apr. 11, 2005)).

In *Att'y Gen. Op.* 05-IB15, the City Council amended the agenda six hours before a meeting to include approval of a proposed subdivision. The amended agenda stated that the "reason for delay in posting" this matter of public business was "due to late arrival of information." Since the city amended the agenda at least six hours in advance as required by FOIA, the "issue then is whether

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the City gave sufficient reason why it could not have included the subdivision in the agenda when it was originally posted on April 7, 2005." Our Office concluded that there was not "any evidence in the record that consideration of the proposed subdivision by the Council was such a pressing matter that it could not be deferred to a later date." *Att'y Gen. Op. 05-IB15*. In *Att'y Gen. Op. 05-IB15*, we determined "that the City violated the public notice requirements of FOIA when it amended the agenda for the April 19, 2005 Council meeting the day before to include the proposed subdivision of 219 East 2nd Street."

Our Office determines that the Town violated the open meeting requirements of FOIA by amending the agenda for the Town's March 12, 2007 three days before without sufficient reason. There is no "evidence in the record that consideration of the [FOIA policy] by the Council was such a pressing matter that it could not be deferred until a later date" (*Att'y Gen. Op. 05-IB19*).

Our Office does not believe that remediation is necessary for this FOIA violation because the Town did not take any formal action on the proposed FOIA policy at the meeting of the Council on March 12, 2007. According to the Town, "this was merely the introduction of an ordinance to adopt a FOIA policy. Thus far, there has been no action on the draft policy." You also acknowledge that the addition of the FOIA policy to the agenda for the March 12, 2007 meeting "is a prerequisite step under the Town Charter before the Council can vote on the ordinance at a subsequent meeting."

The minutes of the March 12, 2007 Town Council meeting confirm that the Town did not take any formal action to adopt the new FOIA policy: "Mayor Branner introduced an ordinance to enact a new policy for FOIA requests. The policy will outline requirements for FOIA requests and will be available for review prior to adoption next month."

The Town provided us with the notice and agenda and minutes of the Council's next meeting

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held on April 2, 2007. The agenda listed for discussion, "Public Hearing – Adopt an Ordinance to enact a new policy for Freedom of Information Act Requests." ² According to the Town, the "FOIA policy was tabled at the April 2, 2007 meeting because the Town is still considering further revisions to the draft policy."

Under these circumstances, our Office does not believe that remediation would serve any purpose at this time. The draft FOIA policy has been the subject of public notice and discussion at two meetings (March 12 and April 2, 2007), and will be the subject of further public notice and discussion in the future.

CONCLUSION

For the foregoing reasons, our Office determines that the Town violated the open meeting requirements of FOIA by amending the agenda for the Council meeting scheduled for March 12, 2007 three days before to include discussion of a new FOIA policy without a sufficient reason why that matter of public business could not be deferred to allow seven days' notice to the public. Our Office does not believe that remediation is necessary for this violation because the Council did not take any official action on the FOIA policy at the March 12, 2007 meeting.

² We note that on April 17, 2007 you made another complaint to our Office alleging that the Town violated FOIA by amending the agenda for the April 2, 2007 meeting three days before to include additional items for public discussion without providing an explanation for the delay in the posting of the new agenda items. Our Office is processing that FOIA complaint separately.

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Very truly yours,

W. Michael Tupman, Esquire
Deputy Attorney General

APPROVED

Lawrence W. Lewis, Esquire
State Solicitor

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cc: The Honorable Joseph R. Biden, III
Attorney General

Richard S. Gebelein, Esquire
Chief Deputy Attorney General

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Town Solicitor

Mary Ann Haley
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